BEFORE THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No.: 33667

JOSEPH & REBECCA FAUBLE

Appellants,

v.

BERKELEY COUNTY
CIVIL ACTION NO: 05-C-83

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Appellees.

BRIEF OF APPELLANTS

Prepared By:
Mark Jenkinson, Esquire (WV 5215)
Lawrence M. Schultz, Esquire (WV 4293)
Burke, Schultz, Harman & Jenkinson
P.O. Box 1938
Martinsburg, WV 25402
Counsel for the Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

KIND OF PROCEEDING AND NATURE OF THE RULING IN CIRCUIT COURT/STATEMENT OF FACTS 1

ASSIGNMENT OF ERROR 9

DISCUSSION OF THE LAW 9

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

1. *Federal Kemper Ins. Co. v. Arnold*
   183 W. Va. 31, 393 S.E.2d 669 (1990) 2, 4, 9, 10

2. *Hayseeds, Inc. v. State Farm Fire & Cas.*
   177 W.Va. 329, 352 S.E.2d 79 (1986) 8, 9, 10, 11, 12, 14, 17, 18

3. *Richardson v. Kentucky National Ins. Co.*
   216 W.Va. 464 (2004) 9, 10, 12, 18

4. *Aetna Casualty & Surety Co. v. Pitrolo*
   176 W.Va. 190, 342 S.E.2d 156 (1986) 12

5. *State Auto. Mut. Ins. Co. v. Youler*
   183 W.Va. 556, 396 S.E.2d 737 (1990) 16

6. *Aetna Casualty & Surety Co. v. Shambaugh*
   747 F.Supp. 1203 N.D.W.Va. (1990) 16

7. *Thomas v. Nationwide Ins. Co.*
   188 W.Va. 640, 425 S.E.2d 595 (1992) 16

KIND OF PROCEEDING AND NATURE OF THE RULING IN CIRCUIT COURT / STATEMENT OF FACTS

Appellants Joseph and Rebecca Fauble appeal the erroneous and prejudicial Order of the Circuit Court of Berkeley County entered December 5, 2006.

Joseph and Rebecca Fauble ("Faubles") appeal from the Circuit Court's denial of their claim for attorney fees from their first party insurer, which instituted, and lost, litigation with them.

For ease of reference, the following is a timeline of the procedural and factual history of the case:

Date	Event
6/9/03	Alex E. Paris Contracting, Inc. negligently damages the Fauble home while blasting for sewer lines.
6/9-12/03	Faubles notify their homeowner's carrier, Nationwide, of the loss.
6/19/03	Faubles hire undersigned counsel in the third-party claim against Alex E. Paris Contracting.
2/13/04	Noting that Paris had "accepted responsibility" Nationwide closes its "reserve."
9/13/04	Nationwide pays $47,737.00 in first-party claims to Faubles, which combined with earlier payments brings the total paid by Nationwide to $49,843.43.

1/26/05	Paris agrees with Faubles' counsel to settle the tort claim for $80,000.00.
2/14/05	Nationwide insists on recovery of the ENTIRE sum it paid the Faubles, refusing to afford them the legally mandated *pro rata* share of attorney fees and costs. The Faubles are forced by Nationwide to file suit against Paris, since they could not accept the Nationwide demand.
3/8/05	Nationwide refuses to permit Faubles to settle their claim with Paris by insisting on full repayment in violation of *Federal Kemper Ins. Co. v. Arnold,* 183 W.Va. 31, 393 S.E.2d 669 (1990).
10/6/05	The Faubles and Nationwide litigate Nationwide's duties under *Kemper*; Faubles win. See Circuit Court Order, dated October 6, 2005.[1]
11/28/05	Nationwide seeks and obtains a stay pending appeal of the Circuit Court Order. Nationwide files petition for appeal.
12/30/05	Faubles finally receive $63,385.33 of $80,000.00 settlement with Alex Paris. $16,614.47 is still tied up in litigation with Nationwide, 11 months after settlement agreement.
5/11/06	Nationwide's Petition for Appeal refused.[2]
5/11/06	By this date, Nationwide had delayed the settlement, forced the filing of the tort claim, intervened against their insureds, lost in the Circuit Court and before this Court, and was finally forced to concede the Faubles were entitled to retain the *pro rata* share of attorney fees and

[1] Supreme Court Index (S.C.I.) pp. 260-263
[2] S.C.I. pp. 371

costs.

6/5/06	The Faubles file a claim for the attorney fees and costs incurred as a result of the ill-conceived and dubious litigation their insurance company forced upon them. Nationwide opposes the Petition for Attorneys Fees.
6/14/06	Faubles finally receive $16,614.47 tied up in Nationwide litigation, nearly 18 months after settlement reached with Paris.
12/5/06	By order of this date, the Circuit Court erroneously and prejudicially denied the Faubles' claims to be reimbursed for the sums they incurred in fighting of Nationwide's meritless and obstructionist claims.[3]

On or about June 9, 2003, Alex E. Paris, Inc. ("Alex Paris") negligently damaged the Faubles' home while blasting for a sewer line. The Faubles were forced by their own insurance company, Respondent Nationwide Mutual Fire Insurance Company ("Nationwide") to institute litigation both against Alex Paris and against Nationwide itself (upon Cross-Claim) in the Circuit Court of Berkeley County. Thereafter, the Faubles

[3] S.C.I. pp. 478-481 It is from this Order that the Faubles now appeal.

prevailed in every respect on their claim against Nationwide not only in the Circuit Court proceeding but also before this Court.[4]

After the West Virginia Supreme Court of Appeals denied Nationwide's Petition for Appeal from the earlier ruling of the Circuit Court, the Faubles petitioned the Circuit Court for an award of attorneys fees against Nationwide, having prevailed in a legal proceeding against their own insurance company. The Circuit Court denied the Faubles their attorneys fees and the Faubles now appeal.

Alex E. Paris Contracting, Inc., agreed to settle with the Faubles for $80,000.00 on January 28, 2005. Everything that occurred after that in the underlying case was a direct result of Nationwide's refusal to recognize the applicability of the bright line rule set forth in *Federal Kemper Ins. Co. v. Arnold,* 183 W.Va. 31, 393 S.E.2d 669 (1990). That dispute was resolved in the Faubles' favor by the Circuit Court by Order entered October 5, 2005, and then, again, by the West Virginia Supreme Court of Appeals when it denied Nationwide's Petition for Appeal from that Order. It was only when the West Virginia Supreme Court of Appeals denied Nationwide's Petition for Appeal that the Faubles could accurately come before the Circuit Court and petition for attorney's fees on the basis that they had "substantially

[4] S.C.I. pp. 260-263, S.C.I. pp. 371

prevailed" in litigation forced upon them by their own insurance company. The petition for attorneys fees and costs was filed within days from the Supreme Court's refusal of Nationwide's Petition for Appeal. The notion that the Faubles could have come to Circuit Court before having substantially prevailed is simply wrong. Nationwide would surely have argued that the Faubles were placing the cart before the horse.

Nationwide now suggests that the dispute between the Faubles and Nationwide did not arise out of any contractual relationship between them. This is a stunning suggestion given that the **only** relationship that the Faubles have with Nationwide is a contractual one. Indeed, it is difficult to imagine any other type of relationship that an individual insured could have with his or her insurance company. Of course, the Circuit Court has already determined that the dispute was one that required that the rights and duties of the parties under the insurance contract be determined.[5] Nationwide also suggests that the Faubles are "seeking to re-open this matter". This too is patently false. If Nationwide were but to read the Agreed Order Lifting Stay entered on the 31st day of May, 2006, it would see that this matter had

[5] See Order of 10/5/05 (S.C.I. pp. 260-263) which stated in pertinent part : "the Court having decided the rights and duties of the parties **under the insurance contract** and settlement agreement in question, orders that the Circuit Clerk shall retire this matter from the docket", (emphasis added.)

already been returned to the active status docket of the circuit court pursuant to that Order.[6]

From the very beginning Nationwide's strategy in this matter has been to simply pretend that the Faubles did not have any claim. They first did this in February 2004 by announcing to the Faubles that Alex Paris and Zurich Insurance Company "were accepting responsibility" and that, therefore Nationwide would be "closing its reserve". This, of course, was done without there having been any negotiations as to the monetary amount that Zurich would agree to pay the Faubles on behalf of its insured, Alex Paris. It was only **after** the Faubles were forced to hire counsel that Nationwide re-opened its file and finally paid on the first-party claim, which it was strictly required to do under the terms of its **contract** with the Faubles. Next, after months of negotiations between counsel for the Faubles and Zurich Insurance Company, a settlement agreement on the third-party claim was reached on January 28, 2005. Once again, Nationwide buried its head in the sand and simply pretended that their obligations to offset their subrogation claim by one-third, in order to share in the Faubles' legal expenses incurred in securing the third-party settlement, simply did not exist. Both the Circuit Court and ultimately the Supreme Court of Appeals of West Virginia let

[6] S.C.I. pp. 378-380

Nationwide know, in no uncertain terms, that they were, indeed, required to take a one-third reduction in their subrogation claim pursuant to well-established precedent.

Even those rulings, apparently, were not enough to force Nationwide to acknowledge its failure and desist. Instead, Nationwide now seems to believe that: (1) there never was any Supreme Court decision refusing their Petition for Appeal (Nationwide made absolutely no mention whatsoever of either their Petition for Appeal or the decision of the Supreme Court to refuse it in their opposition to the Faubles claims for attorney fees); and (2) after two years, Nationwide is actually claiming that this dispute with the Faubles did not arise out of the insurance contract.

In the proceedings below Nationwide, in their Opposition to the Faubles' Petition for Attorneys Fees, attempted to convince the Circuit Court of the following:

1. That Nationwide took no action to delay a settlement with the third party;
2. That this matter was never appealed to the Supreme Court of Appeals of West Virginia;
3. That the Faubles have some other (un-named) relationship with Nationwide besides a contractual one; and,

4. That the Faubles could, and should, have made a claim for attorney's fees based upon their having substantially prevailed in litigation against their own insurer **before** they had substantially prevailed in litigation against their own insurer.

Nationwide attempts to confuse the pro-rata share of attorney fees incurred in the prosecution of the third-party claim against Alex E. Paris Contracting, Inc., with the completely separate award of attorney fees against Nationwide itself, (in an entirely different legal dispute), which is now being sought by the Faubles. It is certainly one of the many ironies of this case that, on the one hand, Nationwide appears resistant to ever paying attorney fees in any shape or form and yet continues to make bad decisions that require them to pay ever increasing attorney fees, not because of anything done by the Faubles, but because of their own willful failure to comply with clear West Virginia precedent. So that it is clear: Nationwide had a duty to pay its pro-rata share of the attorney fees the Faubles incurred in obtaining the subrogation monies. This was clearly the law of West Virginia at the time Nationwide refused to consent to paying its pro-rata share of the fees. Nationwide forced its insureds to litigate over a settled question of West Virginia law. Under *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 329, 352 S.E.2d 79 (1986), Nationwide must pay not just

some pro-rata portion, but all of the reasonable attorney fees incurred by the insureds because of Nationwide's intransigent refusal to comply. The two disputes are separate.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT REFUSED AND DENIED, IN TOTALITY, THE FAUBLES' PETITION FOR AWARD OF ATTORNEYS FEES FROM NATIONWIDE.

DISCUSSION OF THE LAW

Once the facts and procedural history are understood, this case is quite simple. Nationwide forced the Faubles to litigate settled questions of West Virginia law and thereby interfered with and delayed the Faubles recovery for their damaged house. For over 20 years it has been clear that the insured like Faubles are entitled to an award of attorneys fees and costs in this situation.[7] Stated another way, the sole issue presented is whether, when a first-party insured is forced to litigate his *Kemper v. Arnold* rights with his insurer, and the insured prevails, does *Hayseeds, Inc. v. State Farm* require

[7] *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986); *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464 (2004)

the insurer to pay attorney fees short of overruling *Kemper* or *Hayseeds* or both, the answer must be "yes."

A reasonable attorney fee in this situation is, by law, presumptively one-third of the face amount of the policy unless the amount disputed under the policy is either extremely small or enormously large. In these latter circumstances, the judge shall conduct an inquiry concerning a reasonable attorney fee. In this case the insurance coverage on the dwelling under the Nationwide Home Owners policy had a damage limit of $63,800.00. The "other structures" coverage was in the amount of $6,380.00 and the personal property (replacement cost) coverage was $47,850.00. Finally, the "loss of use" coverage was in the amount of $63,800.00. See Nationwide Declarations Page on Policy number 9247HO718387 (The Declarations page and the Nationwide Golden Blanket Homeowners Policy are attached hereto as Exhibit A.) The Faubles had potential claims under all of these separate coverages, which total $181,830.00. Thus, one-third of this amount would be $60,610.00. This coverage amount is neither extremely small nor enormously large and, therefore, the presumption under *Hayseeds* [*supra*] applies and it is Nationwide's burden to show otherwise.[8]

---

[8] *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986); *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464 (2004)

The Court need only review a presumptive award of one-third of the face amount of the policy when a question is presented as to that presumption. Nationwide's only attempt to question that presumptive award is to suggest some alleged inequity in awarding attorney fees of $60,000.00, "arising from a prior recovery of $16,614.17." Nationwide cannot seriously contest the fact that it forced the litigation of the subrogation dispute upon their own insured. If, in such a circumstance, Nationwide can count on paying only a third of $16,114.67, it and other insurers will force all kinds of meritless litigation with insureds that violates the spirit of *Hayseeds*. A calculation of the attorney time spent on the Nationwide-engendered dispute totaled $23,550.00, at counsel's usual hourly rate. This was documented to the Circuit Court. Nationwide chooses to ignore that the dispute was litigated to conclusion at both the Circuit Court level and finally before the West Virginia Supreme Court of Appeals. There can be no real argument that the Faubles did not "substantially prevail" on the issues that were litigated both at the Circuit Court and Supreme Court level. The Faubles respectfully suggest that the $60,000.00 in attorney fees sought in a dispute litigated on complex insurance issues all the way to the State Supreme Court of Appeals is not unreasonable in these circumstances.

Even if the lower court was of the opinion that the original claim for attorneys fees was excessive, it did not so find. Rather, the Circuit Court merely denied the Faubles' Petition for Attorneys Fees in its totality. In doing so, the Court failed to address the appropriate factors that it should have in considering a Petition for Attorneys Fees.[9]

In any event, while reasserting the claim for recovery of the presumptive amount under *Hayseeds [supra],* it would appear appropriate to go over the factors that the Court may wish to consider in making a determination of the appropriate amount to award, to wit[10]:

1. *The time and labor required.*

   A complete itemization of the time and labor required by counsel for the Faubles, including the hourly rate at which the time and labor were charged to the Faubles was provided to the lower Court and stood at a rate of $23,550.00 as of June 5, 2006.

2. *The novelty and difficulty of the questions.*

---

[9] *Richardson v. Kentucky National Ins. Co.,* 216 W.Va. 464, 607 S.E.2d 793 (2004)

[10] *Richardson v. Kentucky National Insurance Company,* 216 W.Va. 464, 607 S.E. 2d 793 (2004) citing syllabus point 4, *Aetna Casualty and Surety Company v. Pitrolo* 176 W.Va. 190, 342 S.E. 2d 156 (1986)

At the very outset of the dispute with Nationwide, when they first hired counsel, the undersigned counsel for the Faubles was advised by counsel for Nationwide, in no uncertain terms, that the Faubles had completely misunderstood subrogation law in West Virginia, and that we were entirely mistaken in our position. Presumably this is an indication that Nationwide felt that we would have great difficulty prevailing on the subrogation question. With regards to novelty, the undersigned will certainly concede that Nationwide's arguments were very novel given the well-established pre-existing West Virginia case law.

3. *The skill requisite to perform the legal service properly.*

It is never easy to litigate legal questions before the circuit court on cross-motions for summary judgment and certainly there is skill required in properly filing and/or responding to Petitions for Appeal to the West Virginia Supreme Court of Appeals.

4. *Preclusion of other employment by the attorney due to acceptance of the case.*

Since the undersigned counsel and his firm do not represent insurance companies, the only preclusion of other employment would be that time spent on this case on behalf of the Faubles, was time that could have been spent in employment for other clients.

5. *The customary fee.*

Again, the Faubles' position is that the *Hayseeds* case makes clear that the presumptive fee is one third of the policy amount, unless the policy is enormously large or unusually small. However, if the court decides to award an "hourly" fee, it is the Faubles' position that the fees presented in the itemization of the work performed (S.C.I. pp. 421-425) are entirely consistent with those charged by counsel in this area with experience similar to the undersigned counsel.

6. *Whether the fee is fixed or contingent.*

This factor is a recognition that contingent employment involves more of a risk on the part of the attorney and that risk should be rewarded in the event that the litigation is successful, as it so clearly was in this case.

7. *Time limitations imposed by the client or the circumstances.*

The undersigned did not believe that this factor bears any relevance to the determination and fee in this matter.

8. *The amount involved and the results obtained.*

While Nationwide seems to suggest that the amount of almost $17,000 is insignificant, the Faubles can assure the Court that it was a great deal of money to them. They were appalled that they had to hire and pay for lawyers to fight a legal battle with their own insurance company to get what they were already entitled to under well-established legal precedent in West Virginia! With regard to the results obtained, the Faubles prevailed at both the Circuit Court level and then, ultimately, before the West Virginia Supreme Court of Appeals and they believe that these results entitle them to the award of reasonable attorney's fees and costs.

9. *The experience, reputation and ability of the attorneys.*

Modesty prohibits too much to be written here, suffice it to say that Mr. Schultz and Mr. Jenkinson have a combined 40 years experience in studying and litigating insurance claims under West Virginia law

and both have been involved in arguing insurance related matters before the Supreme Court of Appeals of West Virginia on multiple occasions, resulting in the establishment of what have become fundamental principles of West Virginia auto insurance law.[11]

10. *The undesirability of the case.*

The undersigned did not believe that this factor has any bearing on any attorney's fees awarded in this matter.

11. *The nature and length of the professional relationship with the client.*

This was the Faubles' first time having to hire a lawyer to sue their own insurance company. The undersigned counsel hopes that while it may not be necessary for them to do that ever again, that they will free to call upon the undersigned counsel for their professional advice in the future.

12. *Awards in similar cases.*

---

[11] *State Auto. Mut. Ins. Co. v. Youler,* 183 W.Va. 556, 396 S.E.2d 737 (1990); *Aetna Cas. & Sur. Co. v. Shambaugh, 747 F.Supp.* 1203 N.D.W.Va. (1990); and *Thomas v. Nationwide Ins. Co.,*188 W.Va. 640, 425 S.E.2d 595 (1992)

The *Hayseeds [supra]* case itself makes it clear that an award of 1/3 of the face amount of the policy is presumed to be standard in these types of cases.

CONCLUSION

Nationwide's suggestion that an award of these attorney's fees would somehow operate as a "windfall" recovery to the Faubles does not withstand scrutiny. The offset of some $17,000 that was finally forced upon Nationwide, in the Circuit Court's Order of October of 2005, was made in recognition of Nationwide's well-settled and obvious obligation to share in the attorneys fees the Faubles incurred in their **third-party** dispute against Alex E. Paris Contracting, Inc., the blasting company that caused the damage to their home in the first place. The Faubles are not seeking a penny in attorney's fees for their lawyers' time spent in securing the third-party settlement. Not one penny. The award of the attorney's fees that the Faubles now seek, for the first time, is reimbursement for time that their lawyers spent in litigating the subrogation dispute with **Nationwide**, their own insurer.

A review of the itemized fees submitted to the Circuit Court (S.C.I. pp. 421-425) will reveal that **all** of the time listed therein was for time and

work necessitated **only** by Nationwide's complete refusal to accept any offset from their subrogation recovery. In other words, the Faubles entered into a one-third contingent fee with the undersigned law firm to prosecute all of their third-party claims. The legal work performed on the third-party claim resulted in a settlement of $80,000 with Alex E. Paris Contracting, Inc. and the undersigned law firm has already been paid their one-third contingency on the third-party claim. Again, the Faubles are not seeking any "increased" compensation for their attorneys on any work performed on the underlying third-party claim. What they now seek is an award of the attorney fees they were forced to incur solely by the intransigence and obstinance of their own insurance company. Such awards are well recognized under West Virginia law.[12] Indeed, one fundamental purpose of such awards is to discourage multi-billion dollar insurance companies from forcing unreasonable litigation expenses upon their own insureds, simply to avoid their pre-existing contractual obligations. If you drag your insureds into court and lose, you must reimburse them for the legal costs you forced them to incur. If there was ever a case for such an award, this is it. The Faubles respectfully request that the Court send a clear message to

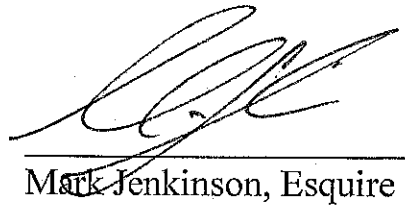
[12] *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464, 607 S.E. 2d 793 (2004); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 329, 352 S.E.2d 79 (1986)

Nationwide (and other insurers) that this type of behavior, which has carried the sanction of attorney fees for over 20 years, is still intolerable.

The Faubles request that this Court reverse the erroneous order of the Circuit Court and order that they be awarded their reasonable attorney fees and costs incurred as a result of Nationwide's intransigence, including the fees and costs associated with this Appeal.

Respectfully Submitted,

JOSEPH AND REBECCA FAUBLE, Appellants
By Counsel



Mark Jenkinson, Esquire (WV 5215)
Lawrence M. Schultz, Esquire (WV 4293)
Burke, Schultz, Harman & Jenkinson
P.O. Box 1938
Martinsburg, WV 25402
(304) 263-0900
Counsel for Appellants

BEFORE THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No.: 33667

JOSEPH & REBECCA FAUBLE

Appellants,

v.

BERKELEY COUNTY
CIVIL ACTION NO: 05-C-83

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Appellees.

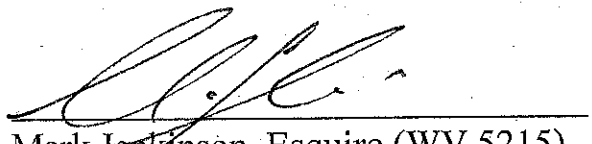
CERTIFICATE OF SERVICE

Type of Service: United States Mail, First Class Postage Prepaid

Date of Service: November 20, 2007

Person (s) Served: Michael Stevens, Esquire
Walter Jones, Esquire
Martin & Seibert
PO Box 1286
Martinsburg, WV 25402

Item Served: Brief of Appellants



Mark Jenkinson, Esquire (WV 5215)
Lawrence M. Schultz, Esquire (WV 4293)
Burke, Schultz, Harman & Jenkinson
P.O. Box 1938
Martinsburg, WV 25402
(304) 263-0900